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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 117

PHILIP BART, *Petitioner*

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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INDEX

	Page
Direction Issue	1
First Amendment Issue	4

Table of Cases

Bowers v. *U. S.* 202 Fed. 2nd 47	5
Chapman, In re, 166 U. S. 661	9
Christofel v. *U. S.*, 338 U. S. 84	5
F. T. C. v. *American Tobacco Co.*, 264 U. S. 294	9
Harriman v. *I.C.C.*, 211 U. S. 407	9
I. C. C. v. *Brimson*, 154 U. S. 447	8, 9
McGrain v. *Daugherty*, 273 U. S. 135	6
Quinn v. *U. S.*, No. 8, O. T.	3
Sinclair v. *U. S.*, 279 U. S. 262	8
U. S. v. *Bryan*, 339 U. S. 321	5
U. S. v. *Rumley*, 345 U. S. 41	8
U. S. v. *L&N Railroad Co.*, 236 U. S. 298	9

Authorities

Constitution, First Amendment	4, 5, 10
Taylor, Legislative Investigations, 29 Notre Dame Lawyer, 225	10

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I.

The Direction Issue

The Government does not urge here that petitioner was in fact directed to answer the questions which are involved in the surviving counts of the indictment. It insists, however, that "petitioner must have understood that his objections to the Committee's questions were regarded as unsound by the Committee, and that he was being required to answer." (G. Br. 16.) We believe that the conclusion of the Government here and of the court below that petitioner was given a proper opportunity to understand that the Committee rejected his answers is unsupported by the record.

In fact, there is an explicit indication in the record that the Committee did not regard it as part of its obligation to

rule on the objections of the witness or communicate to him that his objections were being overruled. Thus, at two separate places in the record the Committee disavowed any need to make the witness aware that his answers were required. After a colloquy (R. 12) between the Committee members and counsel for the witness, Mr. Case, a member of the Committee, stated:

> "Mr. Chairman, it seems to me the witness should be advised of the possibilities of contempt when he fails to answer a question as simple and as proper as your question as to what his name was before it was changed."

But Representative Walter, the Chairman of the Sub-committee (and now Chairman of the full Committee) stated:

> "No, he has counsel. Counsel knows that is the law. Proceed, Mr. Tavenner."

The meaning of this exchange seems plain. Congressman Case suggested that the witness be directed to answer. The Chairman replied that it was not necessary to direct him to answer. Again, after a colloquy with counsel, the Chairman announced (R. 14):

> "Mr. Walter: Of course, you know there are many preliminary questions asked witnesses, leading up to some point. As they are propounded you will readily learn what the purpose is. Just advise your client and don't argue with the Committee, *because we don't rule on objections.*

When we examine the colloquy following the particular questions involved in Counts 3-6 (R. 9-12), we are unable to find that any of petitioner's objections were rejected in such a way as to make it clear to him that he was being required

to answer. The record is equally consistent with the view that the Committee abandoned the question, as with the view that the Committee was demanding an answer.

Nor are the facts more favorable to the Government's position with respect to Count 8. The petitioner responded to the question which gave rise to Count 8 by a legal objection (R. 16-17). After hearing his objection, the Committee Chairman asked:

"And, therefore, you refuse to answer?"

to which the witness replied:

"I refuse to answer."

The Government characterizes this as an "unequivocal refusal" (G. Br. 16). But the fact that the Committee Chairman asked whether the witness refused to answer, and the witness agreed that he was refusing to answer, hardly demonstrates that the witness was being told that his objection was rejected. Indeed, it is difficult to see how this inference can be drawn not only because the naked language does not support it, but because the Committee Chairman had on two occasions told the witness that his objections would not be ruled on by the Committee in any way.

We think it important to say a word about the applicable standard. According to our reading of the decision below and of the lower court's *en banc* opinion in *Quinn* v. *U.S.*, No. 8, this Term, the witness must be clearly appraised that his grounds for not answering are rejected and be afforded another opportunity to answer. It is only by straining the meaning of the colloquies surrounding the answers beyond all recognition and by ignoring language of the Committee to the contrary, that the decision of the court below that the test was here met can be justified.

We do not contend here that the witness cannot refuse to answer "without running the risk of consequences." But,

contrary to the Government's assumption (G. Br. 18), that is not the issue here. The issue is whether there was a refusal. It is precisely because a refusal creates irrevocable consequences that it must be deliberate and knowing.

The Court should not sanction a standard for the conduct of investigations which might seriously jeopardize the freedom of the witness to interpose objections, to seek information from the Committee and to correct its misconceptions. This freedom can only be safeguarded if the Court requires the Committee unequivocally to deal with the witness' responses to its questions through a clearly articulated direction. Such freedom is menaced by the Government's argument which substitutes for an explicit direction by the Committee inferences drawn from the conduct of the witness and the nature of his responses.

In any event, we are at a loss to understand why the court below did not remand this case for the trial court for the application of the proper standard. As Judge Bazelon pointed out in his dissenting opinion, the trial court manifestly did not apply a proper standard of direction. This is seen from the fact that the court found petitioner guilty under Count 7. There was plainly no direction to answer the question involved in this Count for the court below found that the question there involved had been abandoned. And certainly it cannot be contended that there is no dispute or conflict which would raise a question of fact for the trial court. For, as we have shown, the statements of the Committee's Chairman in themselves raise such a conflict.

II

The First Amendment Issues

The Government urges that petitioner's alleged failure to present his First Amendment contentions to the Committee should preclude him from urging them now. We believe

that the Government's contentions are unsound. If, as we urge, the Committee lacked the power under the First Amendment to investigate propaganda in accordance with the terms of its resolution or to exact compulsory disclosure, the witness' objections on this score could not be waived. Compare *Bowers* v. *U.S.*, 202 F. 2d 47 (C.A., D.C.). A challenge to the authority of the Committee of this kind is wholly different from the issue of a lack of quorum, which was presented in *U.S.* v. *Bryan*, 339 U.S. 321, and compare *Christoffel* v. *U.S.*, 338 U.S. 84.

In addition, it must be recalled that while the witness did not raise the issue of the First Amendment in connection with Counts 3-6, that issue was explicitly raised in connection with the broader question upon which Count 8 is based (R. 18). Thus, the witness explicitly relied on the First Amendment in response to the latter question and again referred, in response to a question immediately following, to "the First Amendment to the Constitution which does not allow looking into the political affiliations of individuals. . . ." (R. 18). The mere fact that the witness had not relied explicitly on the First Amendment in connection with what the Committee itself termed preliminary questions cannot be constituted as a waiver of a basic First Amendment objection to the entire inquiry. All of the questions which petitioner refused to answer were, as Judge Kirkland held in his opinion on the motion to dismiss, "directed to one single line of inquiry which was the specific phase of inquiry then being considered by the Committee" (R. 171). A refusal to answer the preliminary questions standing alone could, in any event, not give rise to a punishment for contempt. See *Bowers* v. *U.S.*, *supra*. Compulsory responses to them could only be demanded because of the relation to later questions with respect to petitioner's political associations and affiliations. Since questions of the latter kind were resisted on the ground of the First Amendment, it cannot be said that there

was an effective waiver even before the Committee, and even if such objections could be waived.

In addition to all this is the fact that the petitioner was not informed at the outset of the hearing as to its purpose. The Government can hardly complain if the witness waited in raising his First Amendment objections until those questions were asked which, on their face, disclosed the true purpose of the hearing.

Finally, it is to be noted that petitioner did raise the issue of the First Amendment in his motion to dismiss the indictment, where he attacked the constitutionality of both Public Law 601 on its face and as applied, as well as Title 2, Section 192 (R. 117-119).

The circumstance which is central to petitioner's claim that the conviction herein rests upon an invasion of petitioner's constitutional rights is the nature of the inquiry. We are somewhat at a loss to know with any measure of precision just why the petitioner was called to a hearing, and just what the purpose of the hearing was. The hearing is unredeemed by any claim of legislative purpose. As the Government's brief itself points out, the Committee did not "narrow the inquiry to the consideration of some specific legislative proposal or propaganda activity. . . ." (G. Br. 23). The fact of the matter is that we are dealing here with a hearing which is directed, purely and simply, to the exposure of the witness. We suggest to the Court that the sole purpose of the hearing was to subject the petitioner to public attack by using the processes of the Committee for purposes of exacting compulsory disclosure concerning his private life and politics.

Before dealing with the legal consequences which flow from this fact, we can readily authenticate our charge. In the first place, an examination of the subject matter of the hearing itself—an illuminating test of congressional purposes, *McGrain* v. *Daugherty*, 273 U.S. 135, demonstrates

that the hearing has no content or frame of reference other than the private life of the witness. No legitimate subject matter unifies the hearing or gives a clue to its purpose. Thus, if the Court will examine the 32 counts which form the subject matter of the indictment (R. 108-113), it will find that they all appear to be concerned with the witness' involvements as a Communist, but with nothing else. If there is any observable public interest the protection of which necessitated petitioner's testimony, it is nowhere revealed. One is forced to inconclusive speculations concerning the substantive evil which petitioner's testimony was elicited to illuminate. What does seem clear and what is not denied is that the purpose of the hearing was to "expose" the petitioner.

Our contention is fortified by the testimony at the trial. The testimony at the trial shows that the witness was called because he was a Communist and the Committee was concerned with "Communist activities on Mr. Bart's behalf, his own interest, and in the interests of the Communist Party." The Committee was interested in petitioner's activities as a Communist "from the time he became a Communist until the day the Committee was inquiring" (R. 32). And, finally, at R. 35:

> "Mr. Bart was General Manager of the Daily Worker, which is a publication printed by the Communist Party, and the Daily Worker—the contents of the Daily Worker, have been the subject of many hearings before the Committee. The fact that he was General Manager of the Daily Worker would be in itself sufficient reason to subpoena Mr. Bart as a witness before the Committee."

The Government's brief here repeats:

> "Without more, the circumstance that petitioner was General Manager of the Daily Worker, the Communist

> Party's chief propaganda organ, would justify the Committee in addressing to him a wide range of questions." (G. Br. 25.)

We deny that the language of Public Law 601 can be construed to justify a hearing which addresses a wide range of questions to a witness solely for the purpose of exposing him. Whether or not the House Resolution creating the Committee can be given a constitutional reading, certainly it can in no event be construed to authorize an examination of the private lives of individuals—even of Communists—as an end in itself. Compare *U.S.* v. *Rumely*, 345 U.S. 41.

Indeed, if the House Resolution justifies an inquiry into matters wholly unrelated to propaganda and dealing with such circumstances as what the defendant's name was at birth, whether he had ever written an article in 1934, whether he had used a particular name on a passport, whether he had written a letter in 1939 to one William Weiner, or received a letter from someone else in the same year, or what positions he held in the Communist Party—then all the contentions that have been made concerning the vagueness of the Resolution are amply established.

Certainly, the resolution cannot be construed to justify the compulsory disclosures involved here. We think this is particularly so where, as here, no pressing legislative need is advanced in justification for this extraordinary incursion into the witness' private life and his personal affiliations. Compare *Sinclair* v. *U.S.*, 279 U.S. 262;[1] *Interstate Com-*

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[1] In the *Sinclair* case the Court rejected the witness' contentions that the Committee had discovered a legislative purpose by refusing his motion that the inquiry should avoid all matters then subject to litigation by pointing out that inquiry into the matters involved "might directly aid in respect of legislative action" 269 U. S. at 295. But this is a far cry from the instant situation where (a) a claim is made that the purpose of the inquiry itself is to harass and expose the defendant; (b) the *ad hoc* questions asked relate exclusively to private and personal mat-

merce Commission v. *Brimson*, 154 U.S. 447; *Harriman* v. *Interstate Commerce Commission*, 211 U.S. 407; *U.S.* v. *Louisville & Nashville Railroad Co.*, 236 U.S. 318, 335; *Federal Trade Commission* v. *American Tobacco Company*, 264 U.S. 298, 305, 306.

Whatever circumstances there may be which justify the compulsory disclosure by congressional committees of the private affairs of private citizens, certainly even the most ardent champion of the powers of legislative committees must concede that such invasion must be supported by a clearly expressed legislative purpose. It cannot be justified by a purpose of exposure.

The Government's basic justification in this case is simply the fact that petitioner was a Communist and, perhaps, an important Communist. The Government is, in effect, contending that within the area of Communism the legislative investigating committee is omnipotent. Under the Government's theory, the Committee could subpoena thousands of individuals chosen at random and exact disclosures as to their membership in the Communist Party and details of their private lives. We are confident that the Court will not sanction this attempt to divorce the hunt for Communists from the restraints of the legislative processes. As long ago as *In re Chapman*, 166 U.S. 661, 671, this Court rejected a suggestion that the term "any matter under inquiry" in Section 192 authorized punishment arising out of a non-leg-

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ters; (c) the matter under inquiry is the politics and affiliations of the witness; (d) neither the Committee at the time of the hearing nor the Government at the time of the trial has defined or explained the legislative need for the inquiry or for the information sought. The gist of the matter is this: in the *Sinclair* case an overwhelmingly strong case for legislative action both in terms of purpose and subject matter was sought to be overthrown by a claim that the hearing might—not deliberately but incidentally—invade a non-legislative area. Here an overwhelmingly strong case of non-legislative exposure activity is sought to be supported by reference to a vague, speculative and unparticularized legislative justification.

islative inquiry. The Court noted that the statute must be sensibly construed and "that the word 'any' as used in these sections, refers to matters within the jurisdiction of the two houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto, and to facts or papers bearing thereon."[2]

Nor can the Court accept the view that a political inquiry widens the permissible scope of congressional investigation. If the First Amendment means anything, it means that such investigations require a stronger and not a weaker legislative justification.

Respectfully submitted,

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[2] It has been suggested that these non legislative activities of Congress, resulting from the purpose of shaping public opinion ("the informing function") or from a blunt drive to expose the individual, are marginal functions which are not aided by the power of compelling testimony. See Taylor, "Legislative Investigations", 29 *Notre Dame Lawyer*, 225, 228-229.